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BRIAN DUNNING, and BRIANDUNNING.COM  
9

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN JOSE DIVISION

13 EBAY INC., )

14 Plaintiff, )

15 vs. )

16 DIGITAL POINT SOLUTIONS, INC.; )  
17 SHAWN HOGAN; KESSLER's FLYING )  
CIRCUS; THUNDERWOOD HOLDINGS, )  
18 INC.; TODD DUNNING; DUNNING )  
ENTERPRISES, INC.; BRIAN DUNNING; )  
19 BRIANDUNNING.COM; and DOES 1-20, )

20 Defendants. )  
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CASE NO. C 08-4052

**REPLY BY DEFENDANTS  
THUNDERWOOD HOLDINGS, INC.,  
BRIAN DUNNING AND  
BRIANDUNNING.COM TO EBAY'S  
OBJECTION TO REQUEST FOR  
JUDICIAL NOTICE**

DATE: December 12, 2008  
TIME: 9:00 a.m.  
CTRM: 3

Hon. Jeremy Fogel presiding

1 Defendants Brian Dunning ("B. Dunning"), Thunderwood Holdings, Inc.  
2 ("Thunderwood") and Briandunning.com (collectively, "Defendants") reply to the Opposition  
3 to Request for Judicial Notice filed by Plaintiff eBay, Inc. ("Plaintiff" and/or "eBay") as  
4 follows:

5 1. DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IS PROPER

6 eBay is correct that Federal Rule of Evidence 201 allows for judicial notice of  
7 adjudicative facts not subject to reasonable dispute. As such, judicial notice can be taken of the  
8 following facts apparent from the Complaint attached to Defendants' Compendium of Exhibits  
9 as Exhibit "1" (the "Complaint"):

10 (1) Commission Junction, Inc. ("CJ") commenced an action in Orange County  
11 Superior Court against Defendants Thunderwood and B. Dunning, among others, alleging  
12 causes of action for, *inter alia*, breach of contract and unfair competition;

13 (2) In the Complaint CJ states that it, on the one hand, and Thunderwood, B.  
14 Dunning and other defendants named in this action, on the other hand, entered into the  
15 Publisher Service Agreement ("PSA") attached to the Complaint as Exhibit "A;"

16 (3) The PSA contains the following forum selection clause at Paragraph 9(d):

17 "This Agreement is governed by the laws of the State of California (USA),  
18 except for its conflict of law provisions. The exclusive forum for any actions  
19 related to this Agreement shall be in the state courts, and, to the extent that  
20 federal courts have exclusive jurisdiction, in Los Angeles, California. The  
21 parties consent to such venue and jurisdiction and waive any right to a trial by  
22 jury[;]" and

23 (4) The Complaint, at Paragraph 16, states that Thunderwood and B. Dunning  
24 breached the PSA by, *inter alia*, "providing links and widgets to wrongfully promote and/or  
25 force traffic to ebay.com[;]"

26 The purpose of Defendants' request for judicial notice of the above is not to  
27 establish the truth of CJ's allegations, but rather their existence. The existence of the  
28 Complaint, the PSA and the allegations of the Complaint support the *presumed validity* of the

1 forum selection clause contained in the PSA (*See, M/S Breman v. Zapata Off-Shore Co.*, 407  
2 U.S. 1, 15 (1972); *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 512 (9<sup>th</sup> Cir.  
3 1988)), and that eBay is bound by the same.

4           Taken with the allegations made by eBay in this action, there can be no question  
5 that eBay is “so closely related” to the PSA such that eBay “should benefit from or be subject  
6 to” the clause. (*See, TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F. 2d  
7 1351, 1354 (9<sup>th</sup> Cir. 1990)). Indeed, in the Complaint eBay admits that “eBay used the  
8 services of CJ, a subsidiary of ValueClick, Inc., in administering the Affiliate Marketing  
9 Program.”(Complaint at ¶ 20). In addition, eBay admits that on its behalf “CJ was responsible  
10 for, among other things, recruiting affiliates, tracking affiliate traffic, monitoring compliance  
11 with affiliates, preventing and detecting fraudulent activity, and paying affiliates using funds  
12 remitted by eBay.” (Complaint at ¶ 20). Moreover, every aspect of eBay’s claims against  
13 Defendants arise from Defendants’ participation in eBay’s Affiliate Marketing Program.  
14 (Complaint at ¶¶ 19 to 32). Indeed, only because Defendants were “affiliates” in eBay’s  
15 “Affiliate Marketing Program” pursuant to the PSA were Defendants able to receive monies  
16 from eBay for “Revenue Actions,” which eBay alleges Defendants fraudulently manipulated.  
17 (Complaint at ¶ 19). Simply put, without Defendants’ participation as an affiliate in eBay’s  
18 Affiliate Marketing Program via the PSA, the claims alleged by eBay in the Complaint would  
19 not exist – *there would have been no basis for eBay to make the very payments to Defendants*  
20 *now seeks to disgorge from Defendants by this action.*

21           Having fortified the presumed validity of the forum selection clause contained in  
22 the PSA (and its application to eBay) by the Request for Judicial Notice and eBay’s own  
23 allegations, the burden is on eBay to overcome the presumption by submission of competent  
24 evidence.(*See, Da Cruz v. Princess Cruise Lines, Inc.*, 2000 WL 1585695, fn. 2 (N.D. Cal.  
25 2000) (Plaintiff bears burden of establishing that venue is proper in the forum in which the case  
26 is filed), *citing, Ariola v. King*, 505 F.Supp. 30, 31 (D.Az. 1980); *see also, Hope v. Otis*  
27 *Elevator Co.*, 389 F. Supp. 2d 1235, 1243 (E.D. Cal. 2005)).

28           As set forth in detail in Defendants’ Opposition, eBay fails to meet its burden.

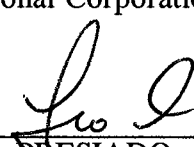
1 2. CONCLUSION

2 Defendants respectfully request that the Court grant their request for judicial  
3 notice in its entirety.

4  
5 DATED: November 26, 2008

Respectfully submitted,

6 RUS, MILIBAND & SMITH  
7 A Professional Corporation

8  
9 By:   
10 LEO J. PRESIADO  
11 Attorneys for Defendants  
12 Thunderwood Holdings, Inc., Brian Dunning  
13 and BrianDunning.com  
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**PROOF OF SERVICE**

*eBay, Inc. v. Digital Point Solutions, Inc., et al.*  
*Northern District of California, San Jose Division*  
*Case No. C 08-4052*

STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF ORANGE )

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 2211 Michelson Drive, Seventh Floor, Irvine, California 92612.

On November 26, 2008, I served the foregoing documents described as **REPLY BY DEFENDANTS THUNDERWOOD HOLDINGS, INC., BRIAN DUNNING AND BRIANDUNNING.COM TO EBAY'S OBJECTION TO REQUEST FOR JUDICIAL NOTICE** on the interested parties in this action by placing a copy thereof enclosed in sealed envelopes addressed as follows:

**SEE ATTACHED SERVICE LIST**

✓ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

— (By E-Mail) As follows: I caused the above-referenced document(s) to be transmitted to the above-named persons.

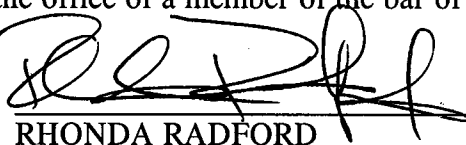
— (By Facsimile) As follows: I caused the above-referenced document(s) to be transmitted to the above-named persons by facsimile.

— (By Hand Delivery) As follows: I caused the above-referenced document(s) to be hand delivered to the above-named persons.

— (By Overnight Delivery) As follows: By overnight delivery via Overnite Express and/or Federal Express to the office of the addressee noted on the attached service list.

Executed on **November 26, 2008**, at Irvine, California.

✓ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

  
RHONDA RADFORD

**SERVICE LIST**

*eBay, Inc. v. Digital Point Solutions, Inc., et al.*  
*Northern District of California, San Jose Division*  
*Case No. C 08-4052*

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